INDEX.

The Case 2

The Validity of a State Statute is Drawn in Question.. 3

The Decision of the Supreme Court of Ohio Was in Favor of the Validity of the Statute in Question.. 7

AUTHORITIES CITED.

Cases.

C. B. & Q. Rwy. v. Drainage Commissioners, 200 U. S. 561 8

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 11

Fiske v. Kansas, 274 U. S. 380 11

Fox River Co. v. R. R. Comm., 274 U. S. 651..... 10

Nectow v. Cambridge, 260 Mass. 441 4

Nectow v. Cambridge, 277 U. S. 183 ..... 3, 7

New Orleans Water Works v. Louisiana Sugar Refining Co., 125 U. S. 18 ..... 3, 5

Village of Euclid v. Ambler Realty Co., 272 U. S. 365.. 3-4

West Chicago Railroad v. Chicago, 201 U. S. 506..... 10

Statutes.

Ohio General Code:

~~Section 237(a)~~ ..... ~~2, 7~~

Sections 4366-7 ..... 1, 3

BLEED THROUGH- POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

STATE OF OHIO, *ex rel.*,
VAAD HACHINUCH HACHAREDI
(Traditional Educational Council),

Appellant,

vs.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER,
FRED A. PEASE and NORMAN KRICHBAUM,
As Members of the City Planning Commission of the
City of Cleveland Heights, Ohio,

Appellees.

BRIEF OF APPELLANT
In Opposition to Motion to Dismiss or Affirm.

This brief is filed pursuant to Rule 7, Paragraph 3, of the Rules of this Court, in opposition to a motion to dismiss or affirm contained in a typewritten document entitled "Statement of Appellees Against Jurisdiction, Including Motion to Dismiss Appeal and Affirm Judgment" filed by appellees with the clerk of the Ohio Supreme Court on October 14, 1947.

The sole ground of said motion is that the judgment of the Supreme Court of Ohio does not draw into question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States.

It being conceded by appellees that the zoning ordinance in question, having been enacted pursuant to authority granted by the Ohio State Legislature in Ohio General Code Sections 4366-7 *et seq.*, is a "statute" within the

meaning of Section 237(a) of the Judicial Code, the issues raised by appellees' motion are:

Does the judgment of the Ohio Supreme Court draw into question the validity of such "statute" on the ground of its repugnancy to the Constitution of the United States?

Was the decision in favor of its validity?

THE CASE.

Appellant, an Ohio corporation not for profit, is the owner of real estate in the City of Cleveland Heights, Ohio. It is part of a national educational organization which sponsors Orthodox Jewish schools throughout the country. Appellant sought to use said property for such school purposes. Appellees refused to permit such use under color of a zoning ordinance.

After hearing, a peremptory writ of mandamus was issued by the Court of Appeals of Cuyahoga County, Ohio, upon concurrence of its three justices, ordering appellees to permit such use of the property.

The Supreme Court of Ohio, two justices dissenting, reversed the judgment of the Court of Appeals and rendered final judgment for appellees.

Appellant's suit was based upon the claim of repugnance of the ordinance, as so applied, to the United States Constitution and the Constitution of the State of Ohio, for the reason that appellant was deprived of the use of its property by considerations having no substantial relation to the public health, safety, morals, or general welfare; and that other schools had been permitted to locate in the same class of use districts as the one wherein appellant's property is located, appellant's property being on the border of such use district.

BLEED THROUGH– POOR COPY

THE VALIDITY OF A STATE STATUTE IS DRAWN IN QUESTION.

It is urged by appellees that no legislation is under attack in this case, and hence the judgment is not subject to review by this Court upon Appeal. In support of this contention it is stated (page 6 of appellees' motion), "The Commission does not set up the use districts." Then there follows a lengthy quotation from *New Orleans Water Works v. Louisiana Sugar Refining Co.*, 125 U. S. 18.

It is necessary to quote from Section 4366-7 of the Ohio General Code to indicate the inaccuracy of the appellees' statement as to the creation of the use districts.

> "The city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the municipality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitation and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act."

Before indicating the inapplicability of the *New Orleans Water Works* case, *supra*, to the case at bar, it will be helpful to advert to *Nectow v. Cambridge*, 277 U. S. 183. The latter case more nearly parallels the case at bar and serves to point up the distinction to be observed in the former case.

In *Nectow v. Cambridge, supra*, on error (now appeal) to the Massachusetts Supreme Court, this Court had before it a zoning ordinance of the same general character as that considered in *Village of Euclid v. Ambler Realty*

Co., 272 U. S. 365. The ordinance was "conceded to be constitutional within that decision." The attack upon the ordinance was that, "as specifically applied to plaintiff in error, it deprived him of his property in contravention of the Fourteenth Amendment."

While the nature of the suit is described on page 186 of the opinion as one for "mandatory injunction directing the city and its inspector of buildings to pass upon an application of plaintiff in error for a permit to erect any lawful buildings * * * without regard to the provisions of the ordinance * * *," we believe it is sufficiently important to present a more detailed account of the proceedings as they are set forth by the Massachusetts court in 260 Mass. 441, 446:

> "After the passage of the ordinance, the plaintiff applied to the city government for an amendment to the zoning ordinance so as to reclassify the locus as business or unrestricted land. This application was denied. Thereafter, he applied to the superintendent of buildings of the defendant city for a permit to construct a building essentially different from any allowed by the ordinance but otherwise lawful. He declined to issue such permit and thereupon the plaintiff, pursuant to G. L. c. 40, par. 27, and St. 1924, c. 133, petitioned the board of appeals to vary the application of the ordinance so as to permit the plaintiff to erect a business building on the locus. This was refused. Thereupon the present suit was brought."

It will be observed at once that neither the superintendent of buildings nor the zoning board of appeals did any legislating; nor can they be said to be legislative arms of the municipality. Obviously, the reason this Court took jurisdiction on error (now appeal) was that the ordinance "as specifically applied to plaintiff in error" deprived him of his property in contravention of the Federal Constitution. The "application" to plaintiff's property took place when these administrative officials refused to permit plain-

BLEED THROUGH– POOR COPY

tiff to use his property. Such refusal, in turn, was based upon the authority of the ordinance questioned.

So in the case at bar, the appellees, the Planning Commission which by state statute zoned appellant's property, enforced the zoning ordinance against appellant's property. And the claim of appellant is, as in the *Nectow* case, *supra*, that the restriction thereby imposed "does not bear a substantial relation to the public health, safety, morals, or general welfare." In the case at bar, too, the suit was directed against the appellees to issue a permit for the use of its property. Here, too, appellees' refusal was based upon the ordinance in question; the minutes of their meeting disclosing a recital *in haec verbae* of the language of the ordinance—and nothing more of substance or materiality—as the ground for their refusal to permit appellant to use its property. (Transcript, page 68 (Ohio Supreme Court Record, page 41).)

A discussion of the merits of the case is not generally called for in proceedings to determine jurisdiction. However, inasmuch as appellees contend (page 5 of their motion) that schools are permitted in zone districts U-2, U-3, U-4, U-5, U-6, and U-7, and also state (page 4) that U-1 uses are permitted in all other use districts, we must point out that the law-director of the municipality testified on cross examination that, as applied to schools, such permissive use in other districts has been subject to his interpretation of the language of the ordinance. (Transcript, pages 133-136 (Ohio Supreme Court Record, pages 106-109).) Property rights should be fixed and determined, and ought not be dependent upon the evanescence of interpretations made by a law-director, no matter how capable or well-intentioned a particular incumbent may be.

The inapplicability of the case quoted by appellees in support of their motion to dismiss, *New Orleans Water Works v. Louisiana Sugar Refining Co., supra*, becomes apparent when it is reduced to its essential elements, invok-

ing, as it does, the constitutional guarantee against the impairment of the obligation of contracts.

In that case the plaintiff had a charter from the State of Louisiana, in effect a contract, granting to it a franchise to supply and sell water from a river. That contract contained a qualifying condition, subjecting the franchise to subsequent grants by the city of New Orleans, to any person contiguous to the river, of the privilege of drawing water from the river for his own use. The plaintiff complained that the action of the city in granting such privilege to defendant impaired the obligation of its contract in contravention of the Federal Constitution.

Obviously, there was no legislation involved in the impairment of the obligation of the contract, if there was such impairment. Obviously, too, the propriety of the city's action in granting to the defendant the privilege of drawing water from the river had to be determined solely within the framework of the qualifying condition contained in that very same contract. As stated by this Court, page 31, the question "depended wholly on the law of the State," —i.e., on the charter granted plaintiff by enactment of the state legislature. The contract for which plaintiff sought protection contained its own qualifying limitations. Whether the limitations imposed by the city came within the terms of the qualification depended upon the construction of the language of the charter. This was therefore quite properly confined to the state courts.

The purport of this decision can be illustrated in yet another manner: If the charter, or "contract," had contained no qualifying limitation, and the city had granted to defendant the privilege of drawing water for its own use, and such grant had been based upon some other enabling state statute, then there would have been a basis for a complaint that the obligation of the contract had been impaired.

BLEED THROUGH– POOR COPY

However, in the case at bar, as in the case of *Nectow v. Cambridge, supra,* the rights of the property owners are derived, in the first instance, from the guarantee in the Fourteenth Amendment to the United States Constitution. The ordinance under attack deprived the owners of that property by restrictions which bore no "substantial relation to the public health, safety, morals, or general welfare," as contended by appellant and as stated in the minority opinion of the Supreme Court of Ohio (Transcript, page 200). That the ordinances in both cases may have been necessarily administered by others than legislative officials, and that the suits were therefore necessarily brought against such officials, does not deprive the suits of their attributes as proceedings attacking the constitutional invalidity of the ordinances as applied to such owners. Consequently they come within the purview of Section 237(a) of the Judicial Code and are subject to review on appeal.

THE DECISION OF THE SUPREME COURT OF OHIO WAS IN FAVOR OF THE VALIDITY OF THE STATUTE IN QUESTION.

The question then arises as to the scope of the judgment of the Ohio Supreme Court within the area defined by Section 237(a) of the Judicial Code.

The statement is made, and underscored, in appellees' motion (page 3) that "The validity of the ordinance itself has not been attacked in this case." That is not correct. The original petition in mandamus filed by appellant (Transcript, page 35 (Ohio Supreme Court Record, page 8)), alleges that

> "* * * said ordinance as so enforced (by appellees) is in violation and derogation of the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States in that thereby (appellant) is deprived of its property without due process of law."

The writ of mandamus was ordered to issue by unanimous decision of the three justices of the Court of Appeals of Cuyahoga County, Ohio.

The Ohio Supreme Court, upon appeal by appellees, reversed that judgment and rendered final judgment for appellees, two of the justices dissenting.

In the majority opinion (Transcript, page 195) the Ohio Supreme Court makes the following statement:

> "It is conceded, too, that the zoning ordinance itself is constitutional. But it is insisted that the respondents have applied the provisions of the ordinance in such an arbitrary and unreasonable manner as to violate the guaranties of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 1, 2 and 19 of Article I of the Constitution of Ohio."

The opinion thereafter makes no further reference to the issue thus raised by appellant. The opinion goes on to a review of the evidence (part of which is inaccurately set forth) and concludes with a finding that appellees did not abuse their discretion in refusing to permit appellant to use its property for school purposes.

In *C. B. & Q. Rwy. v. Drainage Commissioners*, 200 U. S. 561, this Court was called upon to determine its jurisdiction in a case appealed from a state court wherein the state court failed to pass upon the Federal right specially set up in the record.

It was contended that, the state court having based its judgment on the common law, and not expressly on any Federal ground, it could not be said there was any denial of the Federal right claimed; that consequently this Court was without jurisdiction to reexamine the judgment.

Answering this contention, Justice Harlan stated, page 580:

> "But it is equally well settled that the failure of the state court to pass on the Federal right or immunity

BLEED THROUGH– POOR COPY

specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed (581) action of the Drainage Commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. *And that result could not be avoided merely by silence on the Federal question and by placing the judgment on some principle of the common law* * * *. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for, the supreme law of the land must always control. *Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.* That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, *and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States.*" (Emphasis added.)

The claim of a Federal right in the case at bar goes "to the very root of the case and dominated every part of it." It was the basis of appellant's petition for a writ of mandamus. It was the basis for appellant's argument in the Court of Appeals and in the Ohio Supreme Court. The effect of the judgment of the Ohio Supreme Court is to deny to appellant the use of its property, in derogation of its Federal Constitutional right, so specially pleaded and urged at every stage of the case.

To the same effect is the decision in *West Chicago Railroad v. Chicago*, 201 U. S. 506, the first syllabus of which reads as follows:

> "Although the judgment of the state court rests partly on grounds of local or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the Constitution, this court has jurisdiction to review."

And later, in *Fox River Co. v. R. R. Comm.*, 274 U. S. 651, this Court, speaking through Justice Stone, held, page 653:

> "The right set up in the bill is one under the Federal Constitution. *Whether the state court denied that right or failed to give it due recognition is a question upon which plaintiffs are entitled to invoke the judgment of this Court.* Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." (Emphasis added.)

The judgment of the Ohio Supreme Court cannot, in any view of the case, be held to be consistent with the due process clause of the Federal Constitution, denying to appellant, as it does, the use of its property; when such denial sanctions an ordinance, the applicable provisions of which bear no substantial relation to the public health, safety, morals, or general welfare. And this is so even though the court failed to pass upon that specific point, notwithstanding the fact it was urged in so many words in appellant's argument before the court, as the court itself states.

Further authority for the jurisdiction of this Court in the instant case, the effect of the judgment of the Ohio

BLEED THROUGH- POOR COPY

Supreme Court being to enforce the zoning ordinance against appellant, is to be found in *Fiske v. Kansas*, 274 U. S. 380, 385:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Sec. 237 of the Judicial Code. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

This is not the proper stage in the proceedings to make a presentation of the substantive law involved. However, it is proper, we believe, to point out here that our contention at every stage of the case was: notwithstanding the general constitutional aspect of zoning ordinances, the ordinance in question was constitutionally invalid as it affected appellant.

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." (*Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289.)

The rejection of that claim by the Ohio Supreme Court, no matter how phrased, "has the same effect as if the claim of Federal right or immunity had been expressly denied."

The judgment of the Supreme Court of Ohio is in a suit where was drawn in question the validity of a statute of the State of Ohio on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. The Supreme Court of the United States therefore has jurisdiction to review such judgment upon appeal, and we respectfully submit that ap-

pellees' motion should be denied and that the appeal be heard on the merits, on brief and argument.

Respectfully submitted,

EZRA SHAPIRO,
GABRIEL LEEB,
Attorneys for Appellant.

Dated at Cleveland, Ohio, this 30th day of October, 1947.

BLEED THROUGH– POOR COPY